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MARY F. McTIGUE
DIRECTOR

December 10, 1993
AO-93-25

Michael P. Sady, Esq.
Eckert Seamans Cherin & Mellott
One International Place, 18th Floor
Boston, MA 02110

Re: Lobbying Expenses by Ballot Question Committees

Dear Mr. Sady:

I am writing in response to your June 22, 1993 letter, which I have decided to treat as a request for an advisory opinion regarding lobbying expenses by ballot question committees. I apologize for the delay in my response.

You have stated that Citizens United to Reform the Estate Tax ("CURET"), which was created to place an initiative petition on the ballot to force reform of the estate tax, must expend funds to lobby the legislature on matters directly related to CURET's purpose. You have pointed out that 970 CMR 2.06(6)(b)3 and certain opinions issued by this office appear to prohibit lobbying expenditures by ballot question committees even where the expenditures are needed to accomplish the purpose of the ballot question committee.

You contend that this prohibition is inconsistent with sections 6 and 7 of M.G.L. c. 55, as well as the First Amendment rights of CURET, and you have asked this office to reconsider its position. For the reasons which follow, this office agrees that a ballot question committee may make lobbying expenditures which are directly related to enhancing the committee's purpose.

This office has, in the past, consistently advised that although a committee can make expenditures for the purpose of influencing the vote on a ballot question, it may not pay for lobbying expenses, which the office concluded were not within the scope of M.G.L. c. 55. In IB-90-02 this office stated that:

> Expenditures made for the purposes of promoting, opposing or influencing legislation, or the governor's veto or approval thereof, including expenditures for lobbying and lobbying-related activities are <u>not</u> subject to the provisions of G.L. c. 55. This exclusion is applicable even if such expenditures are made after the origination of an initiative or other petition while the subject matter of such petition is being considered by the Legislature for legislative action. . . .

The regulations promulgated by this office, pursuant to G.L. c. 55, prohibit a political committee from "expending money for the purpose of promoting, opposing, or influencing legislation, other than contributions to candidates and political committees not inconsistent with G.L. c. 55, 970 CMR 2.00 or any other law." See 970 CMR 2.06(6)(b)3. In IB-90-02, this office, citing the regulation, stated that "[p]olitical committees organized pursuant to M.G.L. c. 55, in fact, are specifically prohibited from making expenditures related to legislation." This office has issued several opinions which state that committees are barred by the regulation from expending monies to lobby the legislature even on matters that are directly related to the ballot question. See, e.g., AO-83-06, AO-83-13, AO-84-5, and AO-86-15.

In retrospect, the foregoing advice was based upon an overly broad reading of the limitations imposed on political committees, in general, by M.G.L. c. 55, sections 6 and 7 and 970 CMR 2.06(6)(b)3, and did not take into consideration the necessary involvement of ballot question committees in certain aspects of the legislative process.

Chapter 55 specifically allows a political committee to make expenditures directed to the enhancement of the principle or purpose for which the committee was created, provided that such expenditures are not for an individual's personal use. See M.G.L. c. 55, sections 6 and 7. An "expenditure" by a ballot question committee is defined by c. 55 as "any expenditure . . . for the purpose of promoting or opposing a charter change, referendum question, constitutional amendment, or other question submitted to the voters." See M.G.L. c. 55, section 1. Chapter 55 does not contain a prohibition relating to lobbying expenses. Section 7, in pertinent part, provides as follows:

> A political committee or a person acting under the authority of or on behalf of such a committee may receive money or its equivalent, or expend or disburse or promise to expend or disburse the same for the purpose of aiding or promoting [a] . . . principle in public election or favoring or opposing the adoption or rejection of a question submitted to the voters . . . (emphasis added).

The restrictions imposed on political committees by this office's prior interpretation of 970 CMR 2.06(6)(b)(3), when strictly applied to ballot question committees, were unduly burdensome and are not mandated by G.L. c. 55. The regulation was designed to prevent political committees subject to 970 CMR 2.06, in general, from becoming lobbying groups. Such a limitation may be appropriate when applied to other types of committees, but does not make sense when applied to ballot question committees.[1]

1. Although multi-candidate committees may also be able to make expenditures for lobbying consistent with their purpose, this question is not before us and we need not reach it to respond to your stated concerns.

The regulation, to the extent it was interpreted as restricting the lobbying expenditures of a ballot question committee, also restricted the political speech of contributors. The strict application of the regulation to ballot question committees was not justified by an identifiable state interest which might otherwise have supported the restriction on political speech.

Ballot question committees, if they are to be effective, must expend funds for legitimate lobbying purposes in order to promote the principle for which the committees were established. An expenditure which is made for the purpose of "favoring or opposing the adoption or rejection of a question submitted to the voters" should be read to include lobbying expenditures where the lobbying expenditures are directly related to the adoption of the principle supported by the committee.

I agree that the contributors of a ballot question committee do not need protection from having their money used for lobbying on a bill which parallels their initiative petition. As you have suggested, the contributors of a ballot question committee would presumably favor an expenditure which accomplishes the very purpose for which the committee was created.

More importantly, however, pursuant to the Massachusetts Constitution, every initiative petition put forth by a ballot question committee must first be reviewed by the Legislature. See Mass. Const. Amend. art. 48. If a ballot question committee is prohibited from expending monies at this phase of the initiative process while other entities which oppose the committee's purpose are able to expend funds, the committee will be put at a disadvantage.

Moreover, CURET's experience with estate tax reform illustrates the sometimes intimate relationship between a ballot question committee and the legislative process. I understand that after raising funds to pursue an initiative petition, CURET did not pursue the petition since legislation was passed in 1992 substantially changing the estate tax. The 1992 changes, which are to be phased in over a five-year period, are not identical to the changes which were to be included in an initiative petition. It is possible that due to changes in the state's economy or political climate, the phase-in will not take place as enacted, and challenges to the phase-in may be mounted in the Legislature. The Committee intends to develop a strategy for putting the question on the ballot if necessary. In addition, the Committee will monitor the status of corrective legislation submitted to the Legislature by the Department of Revenue to address certain errors in the bill as enacted.

In conclusion, it is this office's opinion that CURET may make expenditures to lobby the Legislature on matters directly related to the principle which CURET was created to enhance. CURET must continue to make all reports of contributions and expenditures to this office, and must, if it actually makes expenditures for lobbying purposes, also comply with the reporting requirements imposed by M.G.L. c. 3, the Legislative Agent Statute, which is administered by the Secretary of State's Division of Public Records.

This opinion is based solely on the representations made in your letter and in telephone conversations with staff of this office, and is rendered solely in the context of M.G.L. c.55.

Please do not hesitate to contact this office if you should have any additional questions.

Very truly yours,

Mary F. McTigue
Director

MFM/cp
cc: Mary Schwind, Director of Public Records
Division of Public Records
Secretary of State